

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

In the matter of

XXXXX

Petitioner

File No. 92543-001

v

Blue Care Network of Michigan
Respondent

Issued and entered
this 30th day of September 2008
by Ken Ross
Commissioner

ORDER

I
PROCEDURAL BACKGROUND

On August 11, 2008, XXXXX, on behalf of her minor son XXXXX (Petitioner), filed with the Commissioner of the Office of Financial and Insurance Regulation a request for external review under the Patient's Right to Independent Review Act, MCL 550.1901 *et seq.* On August 13, 2008, after a preliminary review of the material submitted, the Commissioner accepted the request.

The issue in this external review can be decided by a contractual analysis. The contract involved here is the BCN 5 certificate of coverage issued by Blue Care Network of Michigan (BCN). The Commissioner reviews contractual issues under MCL 550.1911(7).

II
FACTUAL BACKGROUND

The Petitioner, born March 10, 2006, has been diagnosed with gastroesophageal reflux disease (GERD) and food allergies. He has a history of feeding problems and has developed food aversions and fails to orally ingest enough food to sustain him. He is currently getting his

nutrition through tube feeding.

The Petitioner's mother, concerned about his ability to thrive and on the recommendation of his pediatrician, requested a consultation and intensive feeding therapy with XXXXX, PhD, of XXXXX, California.¹ Dr. XXXXX is not part of the BCN network.

BCN denied the request. The Petitioner appealed BCN's denial through the internal grievance process and received BCN's final adverse determination letter dated August 7, 2008.

III ISSUE

Did BCN properly deny the Petitioner coverage for feeding therapy from an out of network provider?

IV ANALYSIS

Petitioner's Argument

The Petitioner's mother contends that coverage should be provided for the consultation and treatment with Dr. XXXXX because the Petitioner has been seen by so many providers (e.g., Children's Hospital of Michigan, a motility specialist at Cincinnati Children's Hospital, gastrointestinal specialists, and an allergist) with little to no success. The Petitioner has also tried many other treatment options (occupational therapy, behavioral therapy, tubes in his ears, scopes, scans, and x-rays) but remains unable to eat normally and on a feeding tube.

The Petitioner's mother says he was fed formula the first few months of life but would spit up frequently and had irregular stools. He also accepted table food and purees. However, at nine-months of age, things changed and he "fell off the growth curve." He was referred to a GI specialist who determined he had GERD and food allergies. By 16 months he stopped eating by mouth and began using an NG tube with elemental formula that cost about \$2500.00 a month. He went from an NG to a G tube during the past year, but still has some vomiting

¹ There is information in the file that suggests that the therapy would be performed in Michigan even though the provider is from California.

episodes. After numerous tests could find nothing wrong he was placed on a GJ tube to bypass the stomach completely. However, this success was short lived as well as the vomiting begun again a few weeks later. The Petitioner's mother says although he has put on weight, he still is not eating orally and is 100% tube fed and has not put on weight in the past four months.

In June 2008, the Petitioner was seen by an occupational therapist and the therapist agreed he needs more intensive feeding therapy. The Petitioner's mother says the only feeding program she is aware of is in Grand Rapids, two hours from her home, and that program is five days a week for six to eight weeks with no guarantee of success. According to the Petitioner's mother, Dr. XXXXX's program guarantees a 95% success rate.

The Petitioner's gastrointestinal specialist wrote in a May 20, 2008, letter to the Petitioner's primary care physician:

[The Petitioner], in the past, underwent and extensive workup which did not reveal any underlying dysmotility disorder. Today, I had a lengthy discussion with the father and have explained that occupational therapy is crucial to improve his oral skills. * * * A referral to the Occupational Therapy Department at Children's Hospital was requested.

The Petitioner's occupational therapist wrote after an initial evaluation on June 25, 2008:

Assessment Summary: [The Petitioner] is a 2-year-old child who was seen for an oral motor evaluation due to limited oral intake. He is currently using a G-tube on a continuous 10-hour drip (overnight) for most nutrition. He will eat small portions of food orally, but quantity and consistency of eating by mouth is significantly limited. He has multiple allergies and issues with constipation and vomiting. When assessed for oral motor skills necessary to chew and swallow food, he demonstrated functional skills. He is able to chew and swallow a wide variety of textures and foods. He has good strength and range in jaw, cheeks, and tongue. His oral motor skills are not limiting him from eating. It is felt that he lacks internal motivation to eat, as he receives his calories at night time and during his nap through his tube. Parent did indicate that he did not tolerate bolus feeding in the past. It is felt that if he cannot tolerate bolus feeding in the daytime, he will not progress with increasing his food quantity. It is recommended that parent work towards a daytime bolus feeding schedule at this time to determine [the Petitioner's] ability to tolerate a full/empty stomach and work towards a regular feeding schedule. After that time, [the Petitioner] could be slowly weaned from tube by decreasing tube feeds and increasing appetite/hunger cues.

The occupational therapist wrote again on August 15, 2008:

[The Petitioner's] most limiting factor in eliminating the use of the g-tube appears to be internal motivation. He has multiple food allergies and GERD...which means that he has a history of pain associated with eating.

* * *

[The Petitioner] would be an excellent candidate for an intensive day-treatment feeding program that would gradually and safely wean him from tube feedings and increase his appetite for oral feedings. With such a program, [the Petitioner] would learn what hunger/satiation is, and therefore his internal motivation to eat would greatly increase. Because of his age, a behavioral modification program included in the feeding program would be most beneficial. He has an understanding of rewards/consequences, and this can be used to motivate him to eat.

Petitioner's mother believes that BCN should cover therapy with Dr. XXXXX because it is necessary to train her son to eat orally and help him thrive.

Respondent's Argument

In its final adverse determination, BCN denied coverage for therapy from Dr. XXXXX, stating, "The [grievance] Panel has maintained the denial, as the provider is not contracted and the medical necessity for the course of treatment cannot be established."

BCN bases its position on these provisions in the certificate:

PART 2: EXCLUSIONS AND LIMITATIONS

This section lists the exclusions and limitations of your BCN5 Certificate.

2.01 Unauthorized and Out-of-Plan Services

Except for emergency care as specified in Section 1.05 of this booklet, health, medical and hospital services listed in this Certificate are covered **only** if they are:

- Provided by a BCN-affiliated provider and
- Preauthorized by BCN.

Any other services will not be paid for by BCN either to the provider or to the member.

* * *

2.03 Services that are not Medically Necessary

Services that are not medically necessary are not covered unless specified in the Certificate. The final determination of medical necessity is the judgment of the Primary Care Physician and the BCN Medical Director.

Commissioner's Review

BCN ostensibly denied the Petitioner's request for occupational therapy (intensive feeding therapy) for two reasons: 1) the therapy was to be furnished by an out-of-network provider, and 2) the medical necessity of the therapy was not shown. (There is no dispute that the Petitioner's certificate covers the type of occupational therapy services he has requested.)

First, it is not completely clear in this record if BCN is questioning only the medical necessity of Dr. XXXXX's therapeutic methods or the medical necessity of any feeding therapy for the Petitioner -- the final adverse determination only questioned medical necessity without specificity. However, in an August 11, 2008, letter to the Commissioner, BCN said:

[T]here is no medical literature to support the treatment provided by Dr. M. XXXXX, psychologist, is as effective or superior to the plan developed by the physicians at Children's Hospital of Michigan, a contracted provider and nationally recognized pediatric institution.

According to the documentation received from the member's occupational therapy evaluation completed on June 25, 2008, the [Petitioner] does eat orally, when he "feels like it." [We] have provided this evaluation for your review as well.

As to the alternative treatments that are available to the [Petitioner], [the Petitioner's mother] should contract her son's primary care physician or specialist to discuss his options.

BCN acknowledges in this letter that the Petitioner may still need some form of therapy to resolve his eating problems. (The June 25, 2008, evaluation at Children's Hospital of Michigan did not recommend any specific course of therapy.) The Commissioner concludes (in the absence of any definitive refutation by BCN) that some additional treatment is needed to help the Petitioner, and accepts BCN's suggestion that the Petitioner work with his primary care physician or a specialist to discuss appropriate treatment.

Secondly, the Commissioner finds that the need to seek services from an out-of-network provider (Dr. XXXXX) has not been shown. BCN is a health maintenance organization (HMO). A fundamental premise of HMOs is the centralization of health care delivery within a

network of providers. HMOs are generally required to provide an adequate number of contracted providers to assure that covered services are available. If they have an insufficient number or type of participating providers, they must ensure that an enrollee obtains services outside the network at no greater cost to the enrollee than if the benefit were obtained from participating providers. See MCL 500.3530. However, before seeking covered and medically necessary services outside an HMO's network, a member must reasonably demonstrate that the needed services are not available within the network. It has not been shown in this case that the Petitioner has been given a treatment plan by any network provider.

Given the history of the Petitioner's feeding problems, the Commissioner understands the Petitioner's mother's wish to help her son achieve the ability to eat normally. Nevertheless, the Commissioner cannot conclude from the record here that appropriate services are not available within BCN's network.

The Commissioner upholds BCN's August 7, 2008, final adverse determination insofar as it denies coverage for out-of-network services since it has not been shown on here that the services were not available within BCN's network. However, BCN must work with the Petitioner and his physicians to define with more precision what therapy the Petitioner needs and then determine how any medically necessary services will be provided.

V ORDER

The Commissioner upholds BCN's August 7, 2008, final adverse determination denying coverage for out-of-network services from Dr. XXXXX. BCN shall work with the Petitioner to explore appropriate treatment or therapy and arrange for it to be provided by network providers.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this Order may seek judicial review no later than sixty days from the date of this Order in the Circuit Court for the county where the covered person resides or in the Circuit Court of Ingham County. A copy of the petition for judicial review should be sent to the Commissioner

of the Office of Financial and Insurance Regulation, Health Plans Division, Post Office Box 30220, Lansing, MI 48909-7720.